No. 82-566

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

ZAPATA-HAYNIE CORPORATION and
HARTFORD INSURANCE COMPANY

Petitioners

versus

SUNNY G. WARD, Widow of
JOHN D. WARD, Deceased

Respondents

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF IN OPPOSITION TO CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## JURISDICTION

Jurisdiction pursuant to Title 28 U.S.C., Section 1254(1) is not contested.

## RESPONDENT'S STATEMENT OF FACTS

While the Respondent herein does not basically disagree with the overall factual statement contained in the Petitioner's Statement of Facts certain additional facts should be pointed out for the benefit of the Court.

It is noteworthy that John D. Ward met his death while flying some two (2) miles offshore over the navigable waters of the United States in an area where he was required to be in order to carry out his job duties as a maritime employee of Zapata-Haynie Corporation which was at all times engaged in the harvesting of menhaden, commonly known as "pogies", from the Gulf of Mexico. It is not contended that John D. Ward was fortuitously over the Gulf of Mexico by virtue of the fact that he could not carry out his job duties as a fish spotter pilot, except in an area over navigable waters. His duties required him to fly over the Gulf of Mexico (undisputedly navigable waters), and to search for menhaden fish, which commonly are found in schools and can be easily viewed from an aircraft by their contrasting coloration.

Not only was Ward required to find these fish, he was also required to direct the activities of the menhaden vessels moving upon these navigable waters. In addition, Mr. Ward was required to direct the positioning of the purse boats (small boats used to pull purse seines and to harvest the fish) and aid in carrying out the mission of the menhaden vessels. He was also required to direct the opening and closing of the purse seines so as to enable the vessels to secure as many menhaden fish as possible. The majority of Ward's time was spent flying over the navigable waters of the United States. In fact, the only time Ward's job duties required him to fly over land was that brief period from the airport to the beach, formally recognized as the "Jensen

line" delineating Longshoremen's coverage. Ward's activities were not isolated, but at the time of his death, he and three (3) other pilots, each flying separate aircraft owned by the employer, were carrying out and performing the same job duties for a fleet of six (6) vessels also owned by the employer which were engaged in menhaden fishing.

## REASONS THAT THIS COURT SHOULD NOT GRANT THE PETITION FOR CERTIORARI

(1) The holding of the Fifth Circuit Court of Appeals in this case is based upon the situs and status test as exemplified in the 1972 Amendments to the Longshoremen and Harbor Workers' Act and not upon pre-1972 law.

(2) The Decision of this Court is not contrary to the dual tests of situs and status as set forth by this Honorable Court in *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979), 100 S. Ct. 328, 62 L.Ed.2d 225 (1979) and *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 53 L.Ed.2d 320, 97 S. Ct. 2348 (1977).

(3) The Decision in the Fifth Circuit Court of Appeals is not in conflict with the other major circuits of the country.

(4) There is no federal or state conflict question.

## ARGUMENT

### I

**THE HOLDING OF THE FIFTH CIRCUIT COURT OF APPEALS IN THIS CASE IS BASED UPON THE SITUS AND STATUS TEST AS EXEMPLIFIED IN THE 1972 AMENDMENTS TO THE LONGSHOREMEN AND HARBOR WORKERS' ACT AND NOT UPON PRE-1972 LAW.**

Petitioner miscontrues the holding of the Fifth Circuit Court of Appeals in this case by stating:

> "The case squarely presents a most important issue. . . . 'Whether Congress excluded people who would have been covered before the 1972 Amendments. . .' "
> (Page 6 of Petition)

The Fifth Circuit based its findings on *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 100 S. Ct. 328, 62 L.Ed.2d 225 (1979) which holds that "maritime employment" was determined by the purpose of the work, not solely the particular skills used. (Page A-6 of Petition). The Court went on to state:

> ". . . Even if we were to apply the stricter definition of maritime employment, requiring a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters, Ward would be covered. Citing Weyerhauser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1976), cert. denied, 429 U.S. 868, 97 S. Ct. 179,

50 L.Ed.2d 148 (1976); Boudreaux v. American Workover, Inc., 680 F.2d 1034 (5th Cir. 1982) (en banc); Ledoux v. Petroleum Helicopters, Inc., 609 F.2d 824 (5th Cir. 1980). (Page A-6, A-7 of Petition)

The Court went on to hold that under the two prong test of *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), cert. denied, 442 U.S. 909, 99 S. Ct. 2820, 61 L.Ed.2d 274 (1979) which provides that an employee may satisfy the status test either by performing, at the time of his injuries, activities properly classified as maritime employment or alternatively by engaging in an occupation considered maritime employment. 580 F.2d 844. The Court then found that since Ward was engaged in a maritime occupation and was performing that occupation at the "moment of injury", he met both prongs of the *Thibodaux* test. (Page A-7, A-8 of Petition).

It is, therefore, respectfully urged that the Court did not base its opinion on the fact that Ward would have been covered prior to the 1972 amendments and, therefore, he remained covered after these amendments, but ruled that Ward was covered under the Longshoremen and Harbor Workers' Act even under the restrictive test set forth in *Thibodaux*, supra.

## II

## THE DECISION OF THIS COURT IS NOT CONTRARY TO THE DUAL TESTS OF SITUS AND STATUS AS SET FORTH BY THIS HONORABLE COURT IN P. C. PFEIFFER CO., INC. V. FORD, 444 U. S. 69 (1979), 100 S. Ct. 328, 62 L.ED.2D 225 (1979) AND NORTHEAST MARINE TERMINAL CO. V. CAPUTO, 432 U. S. 249, 53 L.ED.2D 320, 97 S. Ct. 2348 (1977).

Respondent would incorporate, in support of her argument on Point 2, the authority set forth above in her argument on Point 1 and would further point out to the Court that the factual situation of this case meets the two prong test of situs and status as set forth in *P. C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69, 100 S. Ct. 328, 62 L.Ed.2d 225 (1979) and *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 53 L.Ed.2d 320, 97 S. Ct. 2348 (1977). No logical factual argument may be made that the activities of John D. Ward were not maritime in character in that they have traditionally been so held. Neither can any argument, based on rational analysis, be made that John Ward did not meet his death on the situs of the navigable waters of the United States.

## III

## THE DECISION IN THE FIFTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE OTHER MAJOR CIRCUITS OF THE COUNTRY.

The Petitioner asserts that the decisions of the First, Second, Third, Fourth and Ninth Circuits conflict with the decision in the case at bar. Your Respondent finds no evidence of inconsistency with the aforementioned Circuits

or the cases cited as authority in said Circuits. Respondent would point out to the Court that in no case relied upon by Petitioner involved a fishspotter whose normal job duties required him day in and day out to perform duties which are an integral part of navigation and commerce on the navigable waters of the United States.

## FIRST CIRCUIT

Petitioner relies upon *Graziano v. General Dynamics*, 663 F.2d 340 (1st Cir. 1981) which deals with a maintenance-mason employed in a shipyard who was granted coverage based upon his meeting the "status" requirement of the Longshoremen and Harbor Workers' Act. This employee's activities involved primarily the repair of masonry and shipyard builders, 363 F.2d 340, 341, these job duties have a much less significant relationship to traditional maritime activities than the job duties of John Ward.

## SECOND CIRCUIT

Petitioner argues *Fusco v. Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979) vacated and remanded, 622 F.2d 111 (1980), cert. denied, 449 U.S. 1131 (1981), conflicts with the holding in this case. The *Fusco* Court, in defining "maritime activity", ruled that one of the key tests involved is whether or not the activity bears a significant relation to navigation or to commerce on navigable waters. The *Fusco* decision cannot be construed to conflict with the decision rendered in the case at bar inasmuch as all of the job duties of the deceased fishspotter, Ward, centered around navigation, commerce and the loading of a vessel.

## THIRD CIRCUIT

Petitioner further submits the holding of *Dravo v. Banks*, 567 F.2d 593 (3rd Cir. 1977) to be in conflict with the case at bar. However, a close reading of the *Dravo* case shows that the emphasis of the Court was on the "status" question presented and the Court determined that the duties of Banks, a maintenance employee who cleaned up debris, had no traditional maritime characteristics and were not a necessary ingredient in the shipbuilding process. In the case at bar, there were significant maritime characteristics, based upon Ward's duties of aiding in navigation of the vessels.

## FOURTH CIRCUIT

The case of *Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980), rev'd on other grounds in *Rodriguez v. Compass Shipping Co.*, ____ U. S. ____, 101 S. Ct. 1945, 68 L.Ed.2d 472 (1981), addresses the issue of available remedies to a railroad's pier laborer. The Court was struggling with whether the Federal Employees Liability Act or the Longshoremen and Harbor Workers' benefits were applicable. The *Caldwell* case points out the basic proposition that the Longshoremen and Harbor Workers' Act should be interpreted broadly in favor of the injured longshoremen and points out that the test for coverage is more than just meeting the situs requirement. Simply stated, the dual test of situs and status must be met just as it was in the case at bar.

## NINTH CIRCUIT

Petitioner then cites *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1976), cert. denied, 429 U.S. 868, 97

S. Ct. 179, 50 L.Ed.2d 148 (1976), and contends that it conflicts with the decision in the case at bar. The issue in *Weyerhauser* was whether a "pond man", whose duties required him to sort logs and feed them into a saw mill, was engaged in maritime employment and thus entitled to coverage under the Act. The Ninth Circuit, in denying coverage, correctly ruled that such activity was not covered under the Act. The factual distinction between the employee in *Weyerhauser* and John Ward is so apparent that it need not be emphasized.

Lastly, the Petitioner cited *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), cert. denied, 442 U.S. 909, 99 S. Ct. 2820, 61 L.Ed.2d 274 (1979), and argues that the Fifth Circuit is abandoning its previous position. A close and careful reading of the *Thibodaux* case indicates that the reasoning behind the case in *Thibodaux* denying coverage was the fact that the oilworker in question was fortuitously over the waters as opposed to being engaged in activities of traditional maritime employment. In the case at bar, the deceased, Ward, was performing his actual job activities prior to meeting his death. He performed substantially all of his job duties while working over the navigable waters rather than fortuitously being there. A clear distinction, therefore, arises between *Thibodaux* and Ward since "the locality of the work situs fortuitously rendered it necessary to travel over water", 580 F.2d 841, 845, whereas John Ward could only perform his job duties except by traveling over water.

Likewise, the case of *Executive Jet Aviation, Inc. v. City of Cleveland*, 459 U.S. 249, 92 S. Ct. 493, 34 L.Ed.2d 454 (1972) does not support the contentions of the Petitioner since the land based aircraft referred to therein was fortuitously over Lake Erie and was in navigation between two

land based air fields. The air craft in *Executive Jet* performed no function which could in any way be related to "traditionally maritime activities, involving navigation or commerce on navigable waters", 93 S. Ct. 493, 498, a clear distinction from the factual issues in this case. It is respectfully submitted that *Executive Jet* clearly sets forth a test met by this factual situation and that but for the employee/employer relationship that Admiralty jurisdiction would apply. However, the Longshoremen and Harbor Workers' Act abrogated Admiralty jurisdiction to an employee against his employer, except as provided in Section 905(b) of the Act, which does not apply here.

## IV

## THERE IS NO FEDERAL OR STATE CONFLICT QUESTION.

The argument on Point 4 states without authority that the Court should decide whether Ward was a "fisherman and, therefore, a member of the crew of a vessel or a land based airplane pilot." (Page 12, 13 of Petition). It would appear that Zapata-Haynie argues that a fisherman must be a member of the crew of a vessel even though the Fifth Circuit did not so find and that regardless of the traditionally maritime activity required of a land based pilot in order to carry out his job duties that he would be relegated to the inferior benefits of the Mississippi Workmen's Compensation Act, Section 71-3-1, et seq of the Mississippi Code of 1972, Annotated, while all other fellow maritime employees enjoy the enhanced benefits of the Longshoremen and Harbor Workers Act. This reasoning wholly ignores the intent of Congress as recognized in *Northeast Marine Terminal, Inc. v. Caputo*, 53 L.Ed.2d 320, 432 U.S. 249, 97

S. Ct. 2348 (1977) which holds:

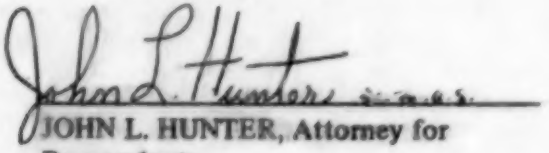
> "The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extent of coverage. Indeed such a construction is appropriate for this remedial legislation. The Act 'must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results.' " Citing Voris v. Eikel, 346 U. S. 328, 333, 98 L.Ed. 5, 74 S. Ct. 88 (1953). 53 L.Ed.2d 320, 335.

At no time did the Respondent agree to be bound by or to accept state compensation payments in lieu of her statutory vested right to compensation under the Longshoremen and Harbor Workers' Act which she sought from the beginning. There is no issue before this Court regarding the application of those payments, because it is readily conceded by the Respondent hereto that any payments made pursuant to the Mississippi Workmen's Compensation Act should be credited against the payments required under the provisions of the Longshoremen and Harbor Workers' Act.

## CONCLUSION

It is respectfully submitted by the Respondent hereto that the only confusion, dilemnas and novel questions are those created in the mind of the Petitioner and, therefore, since the opinion of the Fifth Circuit Court of Appeals is based upon sound legal authorities and the evidence presented in this case, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted



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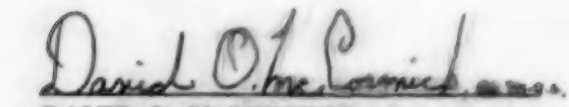

DAVID O. McCORMICK, Attorney for Respondents

## CERTIFICATE OF SERVICE

I, JOHN L. HUNTER, of the law firm Cumbest, Cumbest & Hunter, P. A., do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Response to Petition for Writ of Certiorari to Clerk, U. S. Supreme Court, Washington, D. C., 20210; Honorable Alben N. Hopkins, Attorney-at-Law, P. O. Box 1510, Gulfport, Mississippi, 39501; Ms. Laurie M. Streeter, Associate Solicitor, U. S. Department of Labor, Suite N-2620, NDDL, Washington, D. C., 20210; and Mr. Ralph M. Hartman, Director, Office of Workers' Compensation Programs, U.S. Department of Labor, Suite S-3524, NDOL, Washington, D. C., 20210.

This the 28th day of October, A. D., 1982.

John L. Hunter p.m.g.s.

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